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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 AMERICAN FEDERATION OF
4 GOVERNMENT EMPLOYEES, AFL-CIO,
et al,

5 Plaintiffs,

6 v.

25 Civ. 1237 (DLC)

7 U.S. OFFICE OF PERSONNEL
8 MANAGEMENT, et al,

9 Defendants.

Teleconference

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10 New York, N.Y.
11 June 13, 2025
3:05 p.m.

12 Before:

13 HON. DENISE COTE,

14 District Judge

15 APPEARANCES

16 LEX LUMINA LLP
Attorneys for Plaintiffs

17 BY: RHETT O. MILLSAPS II
CHRISTOPHER J. SPRIGMAN

18 -and-

DEMOCRACY DEFENDERS FUND

19 BY: ANDREW H. WARREN

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24 Assistant United States Attorneys

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(Teleconference)

THE COURT: Good afternoon, counsel. This is Judge Cote speaking.

Do we have a court reporter?

Thanks so much.

Let me call the case.

American Federation of Government Employees v. OPM, 25 Civ. 1237.

Who will be speaking on behalf of the plaintiffs?

MR. MILLSAPS: Your Honor, good afternoon. This is Rhett Millsaps of Lex Lumina, on behalf of plaintiffs.

THE COURT: Thank you.

And who will be speaking on behalf of the defendants?

MR. FARBER: Good afternoon, your Honor.

This is Assistant United States Attorney David Farber, on behalf of the defendants.

THE COURT: Thank you so very much.

Thank you for your drafts of preliminary injunctions and preliminary injunctions yesterday, day-to-day. I issued an order confirming today's telephone conference and attaching a draft preliminary injunction order of my own. And we'll get to that in a moment. But I have some opening remarks and then we'll make sure we have time to hear from all counsel.

I had hoped, as I stated at the preliminary injunction hearing during summations, and certainly in the days that have

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1 followed, that the government would acknowledge that it had not
2 granted access to the records that are at issue here, that is,
3 records containing the plaintiffs' PII that are contained in
4 OPM databases in the way that it had historically or
5 customarily; and that it was a very imperfect situation that
6 prevailed in the early weeks following the new administration
7 taking office. And that it was committed from this point
8 forward to following the letter of the law, things that are
9 very uncontroversial, following OPM's regulations and
10 procedures and requirements all built to support the Privacy
11 Act's concern among other laws, with the security and safety of
12 the PII.

13 I would have hoped that the government would have
14 represented that, from this point forward, all OPM employees
15 would be properly trained and cleared and vetted before they
16 were given access to those databases or that information. And
17 if you weren't an OPM employee, that OPM would make sure to
18 scrutinize that the employees or the government officials that
19 were being given access or to whom that information was
20 disclosed, again, had been properly trained and vetted, and
21 that an appropriate Privacy Act exception applied to their
22 access; and that they were being carefully considered for what
23 level of access should be given to them.

24 And the third thing I had hoped is that the government
25 would have represented to me that it was actually going to do

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1 an audit on its own to assess what risks had occurred because
2 of the lapses in those first weeks of the administration,
3 lapses that it was committed to making sure were not repeated.
4 And it was going to carefully assess and the right people would
5 assess whether any identifying risks needed to be mitigated.

6 So I don't have that set of representations, and so we
7 are here to consider a preliminary injunction. And let me talk
8 for a moment about my goals then.

9 I feel I have to properly address through this
10 preliminary injunction the very serious deficiencies revealed
11 by the preliminary injunction record. Doing that is
12 challenging because of the very limited information that the
13 government revealed when it produced the administrative record
14 here. It's been parsimonious and, therefore, to craft a
15 preliminary injunction that's appropriate is more difficult.

16 I also do not want to interfere in any way with the
17 efficient operation of the government. The government is here
18 to serve all of us; it's here to serve every individual whose
19 information is contained in those databases. And the
20 government is busy with many tasks and, therefore, I want to
21 make sure that the preliminary injunction order I issue is
22 narrowly confined to what is necessary based on the record that
23 is before me. But, of course, it has to enforce the interests
24 underlying the Privacy Act and the APA that are the basis for
25 this injunction. So proper enforcement of the law is critical.

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1 Let me comment briefly on the two proposed
2 injunctions.

3 The government's injunction I thought was very helpful
4 in several respects. Of course, the government reserves its
5 right to appeal, which is its absolute right. But nonetheless,
6 its proposed injunction recognizes the importance, I think,
7 that there be adequate training and vetting of anyone who is
8 given access to the plaintiffs' PII that's contained in the OPM
9 databases. It also recognizes the appropriateness of
10 identifying a Privacy Act exception that would permit that
11 access and of making sure if administrative access is given,
12 that there is an identified reason for that access.

13 Two other aspects in which the government injunction I
14 think is helpful: It recognizes the need to mitigate the risks
15 from what has happened here, and describing what it's done in
16 that mitigation process, describing it to the Court.

17 And finally, it recognizes a need to identify actually
18 who is an OPM employee, because there are significant legal
19 ramifications that follow from that identification.

20 The government's injunction or proposed injunction,
21 however, I think is far too restrictive to address the problems
22 that were identified in the opinion I issued. First of all, it
23 appears to be addressed only to disclosures where there was
24 administrative access given. And any disclosure, even to a
25 regular user of the system, has to be properly supported under

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1 the Privacy Act.

2 A second problem is that it has a very restrictive
3 definition of a DOGE agent. It restricts it essentially to
4 employees of the DOGE service and those detailed to it. And,
5 of course, the violations here or the likelihood of a finding
6 of violation concerned a bevy of people, including people who
7 are OPM employees apparently.

8 And the third restriction I'll mention is it appears
9 to limit the scrutiny to those given access "to the environment
10 of any data system maintained by OPM." This, I think, is
11 intended to limit the auditing and consideration of risk only
12 to those who've logged into a system, and not to those who had
13 others log in for them as part of their work or may now hold on
14 to copies obtained through their work. So I think those, among
15 other reasons, mean that the government's approach cannot be
16 followed here.

17 On the other hand, the plaintiffs' proposal is, I
18 think, also too restrictive. There were a number of very
19 helpful ideas and issues listed, but two aspects of the
20 plaintiffs' proposal I found to be concerning:

21 One, it appeared to have an automatic impounding and
22 destruction of copies outside OPM. I don't know enough to know
23 that that's the appropriate resolution. And I certainly know
24 enough to understand it to be a subject of any audit that OPM
25 undertakes to make sure it knows what copies were made and

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1 where they went and, to the extent they went outside OPM, to
2 give them appropriate scrutiny and take any steps that it
3 believes are necessary to cure the PII contained in them. But
4 I don't want to impose a regime of automatic destruction
5 without a careful analysis of that, whether or not that's
6 necessary.

7 The second aspect of the plaintiffs' proposal that
8 gave me concern is it appeared to require a reporting to the
9 Court in a period of weeks to follow before any disclosure
10 could be made to a DOGE agent. I want to presume that the
11 government is going to operate now in good faith going forward
12 until it shows me that it can't or shouldn't be given that
13 presumption.

14 We had a hearing. Significant deficiencies came to
15 light as a result of that hearing. Again, I would hope the
16 government would be more forthright in acknowledging that and
17 assuring the Court that that is not its intention going
18 forward. But, again, I don't want to interfere with the
19 ordinary operation of an important government agency. So I am
20 willing to begin at least with a series of reports and not
21 restrict disclosure if the agency in good faith believes
22 disclosure should be given.

23 So I have a proposed order, as you can appreciate.
24 Like you, I would have loved more time, but I've given it my
25 best effort with respect to balancing the various needs on my

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1 docket. And you have the draft preliminary injunction order.
2 I don't expect you've thoroughly analyzed it, that you were in
3 a position to make any and all objections you might want to
4 make to it. I assume you'd want to spend more time with it
5 before you did that and are required to do it.

6 You'll have an opportunity in a moment when I finish
7 speaking to give me any insights that you're prepared to make
8 now, but I assume you're going to ask for more time and also an
9 opportunity to again consult with each other before you give me
10 your final positions.

11 So let me just briefly describe for you what my
12 intention was and what the structure is here.

13 There are three principal sections of the draft
14 preliminary injunction. The first section concerns the world
15 from March 6 going forward, that's the date our administrative
16 record ended. So I have no insight to what happened after
17 March 6, and obviously the plaintiffs don't.

18 And so it sets up two classifications of people to
19 whom disclosures may have been made after March 6. And I'm
20 going to take the second category first.

21 That second category are those individuals that OPM
22 considers to be OPM employees. And as far as I'm concerned, I
23 do not need any information about them so long as they
24 completed all training before disclosure and have acknowledged
25 the rules of behavior in OPM's training materials and had been

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1 properly onboarded as described here. If that did not happen
2 before disclosure, then subsection D on page 3 kicks in. And
3 in that case, if they were given access or disclosure before
4 all of that happened, then I want OPM to identify the employee
5 and explain what they've done since the disclosure to address
6 deficiencies. Hopefully that category will be zero, but who
7 knows.

8 Then going back to page 2, if there was anyone since
9 March 6 that OPM disclosed these records to who it does not
10 consider an employee, then I want a report that explains what I
11 described in subparagraphs A, B, and C on page 2. Did they get
12 the training they should have gotten before disclosure? And if
13 they didn't, when did they get it? And, of course, the
14 important information about vetting and other onboarding that
15 is part and parcel of the agency's normal process or the
16 federal government's normal process. So that's to bring us
17 more up to speed since March 6, since we don't have any current
18 information.

19 The second part of the order has to do with a category
20 of DOGE agents. And this covers a period of time from
21 January 20th on. And, of course, there's a definition of DOGE
22 agents in footnote 2. It excludes certain individuals: Ezell,
23 Hogan, Scales and, to some extent, Sullivan. And for these
24 DOGE agents, there is a more detailed report that's required,
25 and it's because, in part, the February and March audits that

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1 were done by OPM were inconsistent or incomplete. So I want to
2 make sure that OPM has done a reliable, complete audit of
3 access by DOGE agents, and the identification of the Privacy
4 Act exceptions that were involved for these individuals; and to
5 make sure that we're on the same page here as to who is an OPM
6 employee, since the access requirements are different if you
7 are an OPM employee and have a need for access. There's some
8 information I want as described in subparagraph 3 that runs
9 from page 4 to page 5. So that's, in general terms, what's
10 happening in the second section.

11 And then the third and last section has to do with the
12 audit and the mitigation report. And again, it would be
13 wonderful if the government was able to represent that it had
14 already begun this process to mitigate any risks that were
15 unnecessarily created or that were necessarily created, but
16 that need to be followed and made sure were addressed.

17 But here's an audit report description, and I have one
18 amendment I already want to make. And so if you would turn to
19 page 6 of the draft, I want to revise the last clause in
20 subparagraph three. So right now it reads: Including whether
21 any such copies, etc. And it should be revised to read:
22 Including removing access, adjusting a level of access, and
23 impounding and destroying copies.

24 So I think those are some of the steps that an
25 investigator would want to consider when assessing risks of

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1 disclosure to DOGE agents. And I'm going to reserve for the
2 end here a discussion about briefing of a motion for a stay and
3 also how we address a schedule for trial. But we'll wait till
4 the end of this conference to come back to those topics.

5 So let me begin with you, Mr. Millsaps, and anything
6 you want to say. Again, if you would prefer to have more time
7 to reflect and consult with the government before you address
8 anything – excuse me one minute. Sorry. I needed a sip of
9 water – I would absolutely understand that.

10 Mr. Millsaps.

11 MR. MILLSAPS: Yes, your Honor. Thank you.

12 The plaintiffs are grateful for the care that the
13 Court has put into this. And, you know, as you suspected,
14 we've done a preliminary read and analysis and have a couple of
15 points off the top that we thought about. But I think it would
16 be helpful to have a little bit of time to further consider.

17 THE COURT: Great. Great.

18 And I'd ask you after you reflect – and we'll set a
19 schedule for all of this – to then consult with the government.
20 Again, to the extent the parties are able to reach agreement,
21 that would be deeply appreciated.

22 Mr. Farber, do you have any comments that you wanted
23 to give at this time or not?

24 I can't hear you, Mr. Farber. You may be on mute.

25 MR. FARBER: I was, your Honor. I apologize.

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1 Assistant United States Attorney David Farber, on
2 behalf of the defendants.

3 We appreciate the opportunity to respond to the draft
4 order, and I understand that there will be a schedule for
5 briefing. But I did want to make just a couple of short points
6 just so the Court can understand. Because as I heard the Court
7 note, the Court does not want to interfere with ordinary
8 operations of OPM. It's an important government agency.

9 But the terms of this injunction would require OPM to
10 devote dozens of employees in the CIO's office, the CISO's
11 office, the HR office, and the security office on an almost
12 full-time basis to preparing these three forensic audits on
13 exceedingly short time frames, all under pain of contempt. And
14 then all those employees are going to be taken away from the
15 efforts they are pursuing to modernize OPM's IT systems, and
16 also diverted from ensuring they are continuing its day-to-day
17 operations in an appropriate manner.

18 And so I heard the Court, just as an example, for this
19 first audit, which is to be completed in three business days
20 after issuance of the order, that will require identifying
21 hundreds, if not thousands, of OPM employees, contractors, and
22 others who were granted any access, meaning they are a user,
23 just a simple user of a system, or administrative access, to
24 every OPM data system that contains PII for a multi-month
25 period.

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1 And just alone the systems creation spreadsheet that's
2 at the OPM administrative record from OPM 92 to 102, which only
3 entails administrative access, there are hundreds, hundreds of
4 OPM employees that are listed on that spreadsheet alone.

5 So the way that this would be undertaken is to
6 identify every single individual at OPM who has been granted
7 any sort of access, user or administrative, since March 6 until
8 the date of the order. That will likely be hundreds -- if not
9 thousands -- of employees.

10 And then once that is completed, the universe is
11 determined, then each individual employee has to be -- we have
12 to pull records for each of them to determine whether they were
13 trained, whether they were properly appointed, whether they
14 have undergone the vetting processes that are required to
15 determine whether they need to be listed under subsection 1 or
16 subsection 2.

17 It may be you're absolutely right, your Honor, that
18 there may not be any individuals that should be listed there.
19 But in order to certify that under penalty of perjury, under
20 pain of contempt, the agency will have to devote an enormous
21 amount of time and pull employees from all four of those
22 offices that I mentioned just to complete this first forensic
23 audit that is required to be completed within three days, and
24 then has to be completed every month thereafter. So it is an
25 entirely burdensome undertaking that will have to not be done

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1 once, but done every month by OPM.

2 So I just want to make sure -- I don't believe that
3 was the Court's intention, but the way it's worded, it would
4 end up creating a significant, significant burden, and one
5 which a bond of \$1,000, you know, I don't think that that would
6 be sufficient to cover the costs and damages OPM would sustain
7 if it's later found to be wrongfully enjoined.

8 So I leave it there. And I'm happy to discuss with
9 the Court further just to -- we've had a brief amount of time,
10 but we've already touched base with OPM to try and figure out
11 how such an audit could be even completed. And the feedback is
12 that it would grind agency operations to a halt in many
13 different areas and would affect the very modernization efforts
14 that the Court has noted it does not want to disrupt.

15 So I leave it there for now.

16 I'm happy to fully brief these issues according to a
17 briefing schedule. But it is something that we definitely do
18 want to address with the Court.

19 THE COURT: So, thank you, Mr. Farber. That's very
20 helpful. And, of course, part of the issue here is the
21 administrative record is sparse, and so the knowledge base for
22 which the plaintiffs are making their arguments to me and the
23 knowledge base I have from which to assess these issues is
24 limited.

25 I think you understand -- I hope you do -- the goal

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1 here. And it's a little surprising to me that OPM doesn't have
2 a procedure in place to make sure that someone is trained,
3 properly onboarded, you know, in terms of vetting and security
4 clearance, and has completed the -- or acknowledged the rules
5 of behavior before being then given access to OPM's record
6 system. So that is an interesting thing to know.

7 MR. FARBER: I can correct the record right now, your
8 Honor, that those procedures are in place. We submitted
9 detailed declarations that detail how these folks were
10 appointed, how they were vetted, when they were trained. I
11 acknowledge -- and as the Court pointed out -- that there were
12 certain individuals who did not receive privacy training prior
13 to receiving access. But that is essentially all that I think
14 the record shows with respect to training and vetting and being
15 properly appointed.

16 And the Court disagreed with defendants, and I'm not
17 here to argue that, that there was not a sufficient need to
18 know. But OPM did not have centralized databases that include
19 all of this information that can be properly pulled for every
20 single grant of access between March 6 and today, will require
21 a number -- dozens -- of OPM employees to look through and
22 determine who was granted not only administrative access, right
23 -- I took the Court to say that any user account that is created
24 in that time frame also applies here.

25 And so this will be a very, very large undertaking and

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1 will require dozens and dozens of OPM employees to be devoted
2 almost full-time to this effort, especially if it's required to
3 be done on the shortest of time frames.

4 THE COURT: Thank you. That's helpful.

5 So why don't you make a counterproposal then that
6 would achieve the goal, and define how that can be done in a
7 way that's reliable in a time frame that's not oppressive.
8 Because the goal here is one that OPM itself should have. And
9 so I don't think there -- and indeed one that I think its own
10 regulations require. So I'll look forward to you thinking
11 creatively with your client how to identify what is helpful in
12 this analysis.

13 So let's talk about a time frame for the parties to
14 carefully consider what they would object to or what they would
15 request be changed in order to achieve the objectives which I
16 would hope we all share; and then to discuss that with care
17 with each other and, to the extent, again, you're able to reach
18 agreement, to provide that to the Court. And to the extent you
19 have a disagreement, provide that to the Court.

20 So could I suggest that you consult with each other on
21 Monday afternoon. That would give you the rest of today, over
22 the weekend, and Monday morning to think independently. And
23 then on Monday afternoon, to consult with each other with
24 respect to your positions; and to present me, much as you did
25 yesterday, with your competing proposals and any letter of

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1 support or explanation.

2 Does that make sense to you, Mr. Farber, in terms of a
3 time frame?

4 MR. FARBER: Your Honor, I would appreciate some more
5 time. This is Friday afternoon. We would need to talk with --
6 have further discussions with OPM personnel to understand the
7 capabilities and the time frames that these types of audits
8 could be completed in without -- with minimizing the disruption
9 obviously, and think creatively to put forward solutions.

10 So I would push back your Honor's suggested time frame
11 by three days, so that we would submit we would confer before
12 Thursday with plaintiffs, and then make those submissions on
13 Thursday that the Court suggested. And then Friday we could
14 have another discussion with your Honor at a court conference,
15 if that makes sense.

16 THE COURT: Sure.

17 Mr. Millsaps, is that agreeable to you?

18 MR. MILLSAPS: Your Honor, we are concerned that time
19 is dragging on here and irreparable harm has been and may be
20 continuing to be done. And the Court has already granted
21 plaintiffs' motion for the preliminary injunction.

22 And just going back to what Mr. Farber was saying
23 about what an onerous undertaking this audit will be for OPM,
24 it is very alarming for us to hear that he is essentially
25 saying that OPM would need to start from scratch here. It

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1 seems if they've been complying with the law, these audit
2 trails should be available.

3 So we would prefer a shorter time frame for this.
4 Perhaps we could meet in the middle and submit something to the
5 Court by Tuesday or Wednesday instead; meet and confer perhaps
6 with the government by Tuesday. But we leave it to your
7 Honor's wisdom as to what time frame should be appropriate
8 here.

9 THE COURT: Thank you. I appreciate that,
10 Mr. Millsaps.

11 So my goal is already stated on the record here. But
12 I am hopeful the government is going to be cooperating here in
13 good faith. And so I am going to expect that the government
14 will consult with its -- with OPM on Monday and Tuesday of next
15 week, and be in a position by the end of Tuesday to send the
16 plaintiffs its proposal for a revision of my draft. And, of
17 course, by that time, Mr. Millsaps -- and why don't I let you
18 and the government talk about it -- if you have amendments to my
19 draft that you want to suggest, you should also have gotten
20 into the government as soon as possible.

21 And then you'll reserve Wednesday for consultation
22 with each other. And by noon on Thursday, the 19th, you
23 will -- which is Juneteenth, I know, but we're just going to
24 continue to steam ahead here. By noon on the 19th, you will
25 get me hopefully one document with alternatives of proposed

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1 language from the plaintiff or from the government. But if you
2 need to get me two different documents, so be it, and any
3 supporting very brief letter no longer than two or three pages,
4 Thursday at noon. And we'll set up a conference call again for
5 Friday afternoon, the 20th.

6 And I have to say, Mr. Millsaps, in terms of the
7 irreparable harm injury – and I am conscious of that – what I
8 am assuming, even though the government is not representing
9 that this has happened, that it is taking more care now within
10 OPM about access; and that it is making sure people are
11 properly trained, are properly onboarded, and are not given
12 access that they don't need. Maybe I'm going to be wrong here,
13 but I'm assuming that this litigation has already helped
14 enormously in reducing the ongoing risk. And I'm assuming
15 again that OPM wants to locate any risks that were created
16 necessarily or unnecessarily in the first months of this new
17 administration, and is thinking hard about how to address those
18 risks.

19 So again, I'm hopeful.

20 Good. And I want to wish everyone a good weekend and
21 thank you for your assistance.

22 And Mr. Farber, are you going to be ordering a copy of
23 this transcript?

24 MR. FARBER: I will be, your Honor.

25 I do have one more question for you, if you don't

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1 mind.

2 THE COURT: Sure.

3 MR. FARBER: You mentioned a briefing on a motion to
4 stay.

5 THE COURT: Before you speak, thank you for reminding
6 me. I wanted to bring that up.

7 So let me tell you what I'm thinking of in terms of
8 your request for a stay. And it's as follows:

9 I would like you to make a motion for a stay. It's a
10 little hard, I think, when we don't know what that injunction
11 is going to be like. And I would schedule opposition and rule
12 on that. But I will also grant the request that you made for
13 an administrative stay -- or for a stay as an administrative
14 stay of two weeks, which is what you asked for at the end of
15 the preliminary injunction hearing.

16 So if you want a stay from me longer than two weeks,
17 I'm going to want a brief. And feel free to talk with
18 plaintiffs about a briefing schedule next week with respect to
19 that. Is that helpful, Mr. Farber?

20 MR. FARBER: It is very helpful, your Honor.

21 Thank you.

22 THE COURT: Good.

23 And will you both please consult next week about a
24 schedule going forward for the completion of this litigation,
25 what needs to happen before trial, a schedule for a trial, so

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1 we can bring this piece of litigation to an appropriate
2 conclusion.

3 Good. Thank you. Thank you both.

4 Mr. Farber, was that you?

5 MR. FARBER: Yeah. I just wanted to ask you about
6 that as well.

7 I mean, the plaintiffs bring claims under the APA,
8 which are generally decided on cross-motions for summary
9 judgment. Is that how the Court envisions resolution of this
10 case?

11 THE COURT: I don't have a vision. That's what I
12 wanted from the parties.

13 MR. FARBER: Understood. Understood.

14 THE COURT: I just want to know where we go from here.
15 And I want you to consult with each other about that and have a
16 proposal for me to consider.

17 MR. FARBER: Very well. Thank you, your Honor.

18 THE COURT: Appreciate it.

19 Mr. Millsaps, anything else?

20 MR. MILLSAPS: We have nothing further now, your
21 Honor. Thank you very much.

22 THE COURT: Good, good, good.

23 Thanks. Bye.

24 * * *